Supreme Court, U.S.
FILED
MAY 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1349

In the Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL PAUL RICHMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
GEOFFREY R. BRIGHAM
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the government's conduct in this case was so outrageous as to violate the Due Process Clause.

2. Whether the district court abused its discretion when, at a post-trial hearing, it determined that a third-party contact with a juror was harmless and that the juror need not be called for questioning.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Mattox v. *United States*, 146 U.S. 140 (1892)	6
Remmer v. *United States*, 347 U.S. 227 (1954)	6
United States v. *Aguon*, 851 F.2d 1158 (9th Cir. 1988)	4
United States v. *Arteaga*, 807 F.2d 424 (5th Cir. 1986)	5
United States v. *Duvall*, 846 F.2d 966 (5th Cir. 1988)	4
United States v. *Hendrix*, 549 F.2d 1225 (9th Cir.), cert. denied, 434 U.S. 818 (1977)	7
United States v. *Jones*, 707 F.2d 1169 (10th Cir.), cert. denied, 464 U.S. 859 (1983)	7
United States v. *Lovasco*, 431 U.S. 783 (1977)	4
United States v. *Payner*, 447 U.S. 727 (1980)	4
United States v. *Ramirez*, 710 F.2d 535 (9th Cir. 1983)	5
United States v. *Russell*, 411 U.S. 423 (1973)	4
United States v. *Shoffner*, 826 F.2d 619 (7th Cir.), cert. denied, 108 S. Ct. 356 (1987)	5
United States v. *Simpson*, 813 F.2d 1462 (9th Cir.), cert. denied, 108 S. Ct. 233 (1987)	5-6
United States v. *Tobias*, 662 F.2d 381 (5th Cir. 1981), cert. denied, 457 U.S. 1108 (1982)	6

Constitution and statute:

U.S. Const. Amend. V (Due Process Clause)	3
21 U.S.C. 846	1-2

Miscellaneous:

3 C. Wright, *Federal Practice and Procedure* (2d ed. 1982)	7

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1349

DANIEL PAUL RICHMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 860 F.2d 837.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14) was entered on October 26, 1988. A petition for rehearing was denied on December 13, 1988. Pet. App. 15. The petition for a writ of certiorari was filed on February 10, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C.

846. He was sentenced to 18 months' imprisonment. The court of appeals affirmed.

1. In December 1985, petitioner, who had a history of cocaine abuse, contacted a Drug Enforcement Administration (DEA) agent. He told the agent that he would be willing to provide the DEA with the names of large-scale cocaine dealers in the Minneapolis-St. Paul area. Petitioner was subsequently contacted in February 1986 by another agent. Petitioner met with that agent and agreed to provide the DEA with information about Vasilios Loukas, one of petitioner's co-defendants and a large-scale drug dealer in the area. Pet. App. 2.

To test petitioner's reliability, the agent asked petitioner to introduce a drug dealer to another undercover DEA agent. Petitioner arranged the introduction and the agent purchased a small amount of cocaine from the dealer. In early March 1986, however, the DEA learned from another informant that petitioner had discussed his DEA involvement with persons in the drug business. The agency therefore decided not to use petitioner as an informant. It did not, however, tell petitioner that he was no longer working with the DEA because to do so would have compromised the informant who had reported on petitioner's activities. From March 1986 until his arrest in December 1986, petitioner continued to associate and deal with Loukas in the distribution of cocaine. Pet. App. 2-3; Gov't C.A. Br. 3.

On December 18, 1986, federal officials executed a search warrant at petitioner's office while petitioner was present. Both before and after he was advised of his *Miranda* rights, petitioner offered a substantial amount of information about his dealings with Loukas and told officers where they could find physical evidence of these activities in the office. Petitioner was later arrested and indicted. Pet. App. 2-4. In his defense, petitioner argued

that the DEA had entrapped him. Pet. App. 12. The jury returned a guilty verdict.

2. After his conviction, petitioner moved for a new trial on the ground of juror misconduct. Petitioner claimed that after testifying, one of his character witnesses was approached by a man in the parking garage adjacent to the courthouse. The man allegedly told the witness that he had spoken to one of the jurors and that the juror had said he thought petitioner was being taken advantage of and being "taken down the primrose lane" by the government. The district court conducted a hearing at which the witness related the incident. The court then refused petitioner's request to question the juror about the incident, and denied the motion for a new trial. Pet. App. 4-5.

3. The court of appeals affirmed. The court found that the evidence was sufficient to prove that petitioner had criminal intent to commit the offense, and that the evidence of predisposition was sufficient to justify the jury's rejection of petitioner's defense of entrapment. Pet. App. 11-12. The court of appeals also rejected petitioner's claim of jury misconduct, finding "that the misconduct complained of, if any, was harmless to [petitioner]." As the court explained, "[n]o information appears to have been conveyed to any member of the jury," and "if [petitioner's] witness is believed, it appears that this juror was expressing an idea which was favorable to [petitioner]." Pet. App. 6.

ARGUMENT

1. Petitioner first contends (Pet. 8-14) that the DEA's failure to inform him that he would no longer be used as an informant constituted outrageous government conduct that violated the Due Process Clause. This claim is without merit.

First, petitioner failed to raise his claim of outrageous government conduct before the court of appeals; he is therefore precluded from raising the issue now. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In his court of appeals brief and his petition for rehearing, petitioner argued only that the evidence was insufficient to support his conviction and rebut his defense of entrapment. Contrary to his contention (Pet. 13-14), petitioner never made an "outrageous conduct" argument below, nor did he cite any authority to support that legal theory. See Richmann C.A. Br. 17-25; Richmann Pet. for Reconsideration 6-15. His passing remarks criticizing the government's conduct (see Pet. 13-14 (quoting remarks)) were all made in the context of his "sufficiency of the evidence" argument; they did not apprise the court of appeals of any other legal claim (see Pet. App. 11-12), and they cannot be construed at this late date as preserving an independent constitutional issue.

In any case, petitioner's due process claim fails on its facts. The due process defense is a very narrow one. Prosecution is barred only when the "conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction," *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973), and only when "the government activity in question violates some protected right of the *defendant*," *United States* v. *Payner*, 447 U.S. 727, 737 n.9 (1980) (emphasis in original). As one court has noted, the government misconduct must be "so grossly shocking and so outrageous as to violate the universal sense of justice." *United States* v. *Aguon*, 851 F.2d 1158, 1171 (9th Cir. 1988); see also *United States* v. *Duvall*, 846 F.2d 966, 973 (5th Cir. 1988) ("a due process violation will be found only in the rarest and most outrageous circum-

stances"); *United States* v. *Shoffner*, 826 F.2d 619, 626 (7th Cir.), cert. denied, 108 S. Ct. 356 (1987).

The failure of the DEA to tell petitioner that he was no longer being used as an informant was not "grossly shocking" or "outrageous" in light of the circumstances surrounding the investigation. Petitioner himself began his relationship with the DEA, offering his services as an informant. Pet. App. 2. After beginning to work with him, the DEA learned that petitioner had compromised the identity and safety of a DEA agent by describing the agent to other people in the cocaine business. Pet. App. 3. The DEA therefore decided not to use petitioner as an informant; it could not, however, notify petitioner of its decision, because to do so would have jeopardized the other informant who had reported on petitioner's activities. Gov't C.A. Br. 3; see Pet. App. 2-3.

Under these circumstances, the government's conduct was not improper, let alone "so grossly shocking and so outrageous as to violate the universal sense of justice." See *United States* v. *Arteaga*, 807 F.2d 424, 426 (5th Cir. 1986) ("The appropriateness of the government's conduct turns * * * on the needs of law enforcement."). No court has reversed a conviction on such a showing, and courts have regularly declined to find more plausibly blameworthy government conduct to be sufficiently "outrageous" to justify reversal. See, *e.g.*, *United States* v. *Ramirez*, 710 F.2d 535, 539-540 (9th Cir. 1983) (no due process violation where police may have coerced or unlawfully induced informant's cooperation, and where they misled him after concluding he was a double agent, in order to gain as much information from him as possible); see also *United States* v. *Simpson*, 813 F.2d 1462, 1464-1468 (9th Cir.) (no due process violation where FBI continued to use informant after learning that she was exploiting sexual relationship with defendant in order to get information from

him), cert. denied, 108 S. Ct. 233 (1987); *United States* v. *Tobias*, 662 F.2d 381, 385-387 (5th Cir. 1981) (no due process violation where police supplied formula, some of ingredients, and step-by-step advice on manufacturing drug to defendant), cert. denied, 457 U.S. 1108 (1982).*

2. Petitioner also contends that the district court abused its discretion when it ruled that a third party's contact with a juror did not require reversal.

Any "private communication * * * with a juror during a trial about the matter pending before the jury is * * * deemed presumptively prejudicial." *Remmer* v. *United States*, 347 U.S. 227, 229 (1954). Nonetheless, the "presumption is not conclusive," although "the burden rests heavily upon the Government to establish * * * that such contact with the juror was harmless to the defendant." *Ibid.* The "allowance or refusal of a new trial [on the basis of improper juror communications] rests in the sound discretion of the court to which the application is addressed." *Mattox* v. *United States*, 146 U.S. 140, 147 (1892).

Here, the government met its burden to establish that the contact between the third party and the juror was harmless. As the court of appeals underscored (Pet. App. 5-6), it did not appear that the juror who may have had the

---

* Petitioner's claim is especially unpersuasive here, because petitioner had been advised that if he became involved in anything illegal that was not under the supervision and control of the DEA, he could be arrested. Petitioner was specifically told that he was not a police officer and that he had no police function. He was instructed that if he were to become involved in a criminal enterprise of any type, he was required to notify the DEA so that the agency could control the situation. Gov't C.A. Br. 1-2. The actions that petitioner took after the DEA had ceased to use him as an informant, including the laundering of narcotics money, were done without notifying the DEA or obtaining its approval. Gov't C.A. Br. 12-14.

improper contact received any information from the third party that could have been conveyed to the other members of the jury. Pet. App. 6. As the court observed, "[t]here was no evidence that this particular juror, or any other member of the panel, had been exposed to prejudicial information or evidence other than that which was introduced at the trial." *Ibid.* In fact, the comments made by the juror to petitioner's character witness "express[ed] an idea which was favorable to [petitioner]" and "detrimental to the government." *Ibid.* Refusal to grant a new trial on these grounds did not constitute an abuse of discretion.

Nor can this conclusion be challenged on the ground that, at the hearing on the claim of juror misconduct, the district court did not allow defense counsel to question the juror who had supposedly spoken to the third person. See Pet. 17-18. A trial court "has a great responsibility and wide discretion in dealing with a motion for a new trial based on allegations of juror misconduct." *United States* v. *Jones*, 707 F.2d 1169, 1173 (10th Cir.), cert. denied, 464 U.S. 859 (1983); accord *United States* v. *Hendrix*, 549 F.2d 1225, 1227 (9th Cir.), cert. denied, 434 U.S. 818 (1977); see 3 C. Wright, *Federal Practice and Procedure* § 554, at 261-262 (2d ed. 1982). The district court in this case conducted a hearing at which it took the testimony of the third party who was the source of the report of juror misconduct. As the court of appeals observed (Pet. App. 6-8), there was no evidence adduced at the hearing to suggest that the juror was improperly influenced or that information prejudicial to petitioner was communicated to the jury. In these circumstances, and in light of the need to protect the integrity of the deliberative process, the district court did not abuse its discretion by refusing to permit the juror to be questioned about the effect of the contact with the third party on the jury's deliberations.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
GEOFFREY R. BRIGHAM
Attorney

MAY 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00232